

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
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4  
5 August Term, 2004  
6

7 (Argued: December 7, 2004 Decided: February 9, 2005)  
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9 Docket No. 02-4076  
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13  
14 FRANCISCO ROMERO,

15  
16 Petitioner,  
17

18 -v.-  
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20 UNITED STATES IMMIGRATION AND  
21 NATURALIZATION SERVICE, JOHN ASHCROFT  
22 AND JAMES M. ZIGLAR,  
23

24 Respondents.  
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30  
31 Before: CARDAMONE, JACOBS, and CABRANES, Circuit Judges.  
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33 Francisco Romero, a citizen of Mexico, petitions this  
34 Court to review a February 13, 2002 order of the Board of  
35 Immigration Appeals, denying his request for cancellation of  
36 removal under the Immigration and Nationality Act of 1952  
37 and ordering his voluntary departure from the United States.  
38 The ruling of the Board of Immigration Appeals is affirmed  
39 and Romero's petition is denied.

1 CHRISTINE M. FLOWERS, Joseph M.  
2 Rollo & Associates, PC,  
3 Philadelphia, PA (Joseph M.  
4 Rollo, Joseph M. Rollo &  
5 Associates, PC, Philadelphia,  
6 PA, on the brief) for  
7 Petitioner.  
8

9 MICHAEL L. TABAK, Assistant  
10 United States Attorney, New  
11 York, NY (David N. Kelley,  
12 United States Attorney for the  
13 Southern District of New York,  
14 Sara L. Shudofsky, Assistant  
15 United States Attorney, New  
16 York, NY, on the brief) for  
17 Respondents.  
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19  
20 DENNIS JACOBS, Circuit Judge:  
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22 Francisco Romero, a citizen of Mexico, petitions this  
23 Court to review a February 13, 2002 order of the Board of  
24 Immigration Appeals ("BIA"), denying his request for  
25 cancellation of removal under the Immigration and  
26 Nationality Act of 1952 ("INA") and ordering his voluntary  
27 departure from the United States. Romero argues: (i) that  
28 his right to equal protection is violated because the  
29 Nicaraguan Adjustment and Central American Relief Act  
30 ("NACARA"), Pub. L. No. 105-100, Title II, 111 Stat. 2160,  
31 2193-201 (1997), permits cancellation of removal for  
32 similarly situated persons from a list of countries that  
33 does not include Mexico; and (ii) that his right to due

1 process was violated when his representative failed to tell  
2 the immigration judge ("IJ") that Romero was wed to a United  
3 States citizen. As Romero demonstrates no defect in the  
4 BIA's ruling below, that ruling is affirmed and Romero's  
5 petition is denied.

6  
7 **I**

8 Romero entered the United States without inspection in  
9 or about February 1991, at or near San Ysidro, California.  
10 In 1995, Romero went through a marriage ceremony with Evelyn  
11 Ramos, a United States citizen. In December 1995, Romero  
12 petitioned the Immigration and Naturalization Service ("INS"  
13 or "government") for adjustment of status based on this  
14 event. Romero complains that "[t]he record does not  
15 indicate whether any decision was ever made on this  
16 application for immigration benefits." However, Romero has  
17 adduced sparse evidence suggesting that he and Ramos hold  
18 themselves out as a married couple. The administrative file  
19 indicates that Romero's petition for adjustment of status  
20 was denied in March of 1998; that the basis of denial was  
21 the couple's failure to appear at a hearing regarding  
22 certain suspicious circumstances of the marriage; and that

1 Romero received notice of that determination, but never  
2 appealed it.

3 In October 1999, the INS issued a Notice to Appear for  
4 removal proceedings, alleging that Romero was removable  
5 pursuant to INA Section 212(a)(6)(A)(i), as "an alien  
6 present in the United States who had not been admitted or  
7 paroled." Represented before the IJ by one Reverend Robert  
8 Vitaglione, Romero conceded removability, but requested  
9 cancellation under NACARA. Although Romero further conceded  
10 that he was not eligible for relief under NACARA, he argued  
11 that NACARA violates "the equal protection rights of all  
12 aliens." In December 2000, the IJ determined that Romero  
13 was ineligible for cancellation of removal, noted that it  
14 lacked jurisdiction to consider the constitutional challenge  
15 to NACARA, and granted Romero the right to depart  
16 voluntarily. The BIA affirmed the IJ's ruling.

## 17 18 II

19 NACARA directs (inter alia) that the Attorney General  
20 adjust the status--to that of lawful permanent resident--of  
21 any alien who: (i) is a national of Cuba or Nicaragua; (ii)  
22 has been continuously present in the United States since

1 December 1, 1995; and (iii) filed for permanent resident  
2 status before April 1, 2000. NACARA § 202(a)-(b). The  
3 government concedes that under NACARA Romero would be  
4 entitled to adjustment of his immigration status to that of  
5 a lawful permanent resident if he were a national of Cuba or  
6 Nicaragua. Romero contends that his ineligibility for  
7 adjustment of status violates principles of equal  
8 protection, because NACARA affords relief for nationals of  
9 certain countries, of which Mexico is not one.

10 "[T]he power to expel or exclude aliens [i]s a  
11 fundamental sovereign attribute exercised by the  
12 [g]overnment's political departments largely immune from  
13 judicial control." Rojas-Reyes v. INS, 235 F.3d 115, 122  
14 (2d Cir. 2000) (alterations in original) (quoting Fiallo v.  
15 Bell, 430 U.S. 787, 792 (1977)); see also Giusto v. INS, 9  
16 F.3d 8, 9 (2d Cir. 1993) ("Congress has plenary authority to  
17 regulate matters of immigration and naturalization  
18 . . . ."). "[T]he most exacting level of scrutiny that we  
19 will impose on immigration legislation is rational basis  
20 review. Under this review, legislation will survive a  
21 constitutional challenge so long as there is a facially  
22 legitimate and bona fide reason for the law." Rojas-Reyes,

1 235 F.3d at 122 (internal citations and quotation marks  
2 omitted).

3 We are not the first federal court of appeals to  
4 consider whether NACARA's preferential treatment of  
5 particular nationalities runs afoul of equal protection  
6 principles. Our sister courts that have considered this  
7 issue have repeatedly held that NACARA is supported by  
8 "facially legitimate and bona fide reason[s]." Id. See,  
9 e.g., Pinho v. INS, 249 F.3d 183, 190 (3d Cir. 2001) ("The  
10 special exemptions . . . for members of these extremely  
11 identifiable groups bear[] at least a rational relationship  
12 to the legitimate government interests of foreign relations,  
13 national security policy, and compliance with on-going  
14 government programs.") (internal citation and quotation  
15 marks omitted); Ram v. INS, 243 F.3d 510, 517 (9th Cir.  
16 2001) (explaining that aliens from the NACARA countries took  
17 unusual risks in escaping oppressive regimes and war-torn  
18 countries, and holding that "this decision to favor aliens  
19 from specific wartorn countries must be upheld because it  
20 stems from a rational diplomatic decision to encourage such  
21 aliens to remain in the United States"); Appiah v. INS, 202  
22 F.3d 704, 710 (4th Cir. 2000) (holding that "NACARA easily

1 withstands constitutional challenge” and explaining that  
2 Congress intended to honor pre-existing understandings with  
3 certain groups of aliens). At least one court of appeals  
4 has considered--and rejected--the under-breadth argument  
5 that Romero makes in his petition to this Court. See Ashki  
6 v. INS, 233 F.3d 913, 920 (6th Cir. 2000) (“Although the  
7 NACARA exemptions clearly do not cover all aliens who will  
8 face hostile conditions in their homelands, this fact does  
9 not make these exemptions irrational.”).

10 We agree with the reasoning of our sister courts, and  
11 we hold that NACARA’s preferential treatment of Cubans and  
12 Nicaraguans over Mexicans meets the standards we apply to  
13 immigration decisions made by the political branches of  
14 government.

### 16 **III**

17 Romero contends that his due process rights were  
18 violated when his counsel failed to “inform the  
19 [immigration] court that the Petitioner was married to a  
20 United States citizen and eligible to adjust status pursuant  
21 to Section 245(i) of the INA.” “As deportation proceedings  
22 are civil in nature, aliens in such proceedings are not

1 protected by the Sixth Amendment right to counsel." U.S. v.  
2 Perez, 330 F.3d 97, 101 (2d Cir. 2003). Therefore, to  
3 prevail on an ineffective assistance of counsel claim, an  
4 alien

5 must show that his counsel's performance was so  
6 ineffective as to have impinged upon the  
7 fundamental fairness of the hearing in violation  
8 of the [F]ifth [A]mendment due process clause. To  
9 show fundamental unfairness, an alien must allege  
10 facts sufficient to show 1) that competent counsel  
11 would have acted otherwise, and 2) that he was  
12 prejudiced by his counsel's performance.

13  
14 Id. at 101 (internal citations and quotation marks omitted).

15 In his 1995 petition for adjustment of status, Romero  
16 asserted that he was married to a United States citizen.  
17 That petition was denied in March of 1998, and Romero never  
18 appealed that denial. Romero now contends that his  
19 representative's failure to raise again Romero's purported  
20 marriage during Romero's removal proceeding constituted  
21 ineffective assistance of counsel. The government argues  
22 procedural bar. However, even assuming that this claim has  
23 been preserved and raised, the representation Romero alleges  
24 created no "fundamental unfairness."

25 To begin with, it was entirely reasonable and prudent  
26 for Romero's counsel to forgo any reference to Romero's  
27 purported marriage. The marriage may or may not have been a



1 sham, but Romero's petition for relief on that basis had  
2 been rejected in March 1998, and Romero did not appeal.  
3 These circumstances could only impair Romero's credibility  
4 on any other issue he would care to raise. In any event,  
5 Romero was not prejudiced by his representative's failure to  
6 invoke a marriage that had previously been deemed  
7 insufficient to merit an alteration of Romero's status;  
8 there is little chance the IJ would have deemed the issue  
9 relevant in any way that would do Romero any good.

#### 11 **CONCLUSION**

12 For the foregoing reasons, the ruling of the BIA is  
13 affirmed and Romero's petition is denied.